Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

NO.

IN THE MATTER OF HARRY C. BROWN, SR., PROBATE JUDGE FOR JASPER COUNTY, SOUTH CAROLINA,

Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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88 pp

QUESTIONS PRESENTED

1. Whether Due Process and Equal Protection of the law precludes a finding of unethical conduct where the conduct complained of is authorized by State Statute?

2. Whether without prior Notice Petitioner may be sanctioned for a purported act of mis-conduct or breach of ethics even though the conduct complained of is a vested right authorized by State Statute or a valid subsisting State Statute?

PARTIES TO THE PROCEEDING

Petitioner represented on this Petition is the elected and qualified Judge of Probate for Jasper County, a political subdivision of the State of South Carolina.

Petitioner's adversary is The Board of Commissioners on Judicial Standards (referred to hereinafter as Commission). Counsel for the Commission. are Charles Malony Condon, Esquire, Attorney General for South Carolina, and Nathan Kaminski, Jr., Esquire, Senior Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549, Phone: 803-265-6283.

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A. Whether due process and equal protection of the law precludes a finding of unethical conduct where the conduct where the conduct complained of is authorized by State Statute?

B. Whether without prior Notice Petitioner may be sanctioned for a purported act of misconduct on breach of ethics, even though the conduct

complained of is a vested right authorized by State Statute on a valid subsisting State Statute?

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Carolina is reproduced at pages 27 through 28 of the Appendix to this Petition and is cited hereinafter as "Final Order." The unpublished "Certification to the Supreme Court" of The Board of Commissioners on Judicial Standards is reproduced at pages 19- 21 of the Appendix to this Petition and is cited hereinafter as "Commission Certification."

JURISDICTION

The judgement of the Supreme Court of South Carolina was entered on September 11, 1996. This Court has jurisdiction under 28 U.S.C. 1257 (C). Jurisdiction of the Supreme Court of South Carolina was proper pursuant to Rule 502, Judicial Discipline and Standards Appellate Court Rules. Jurisdiction of The Board of Commissioners on Judicial Standards was proper pursuant to Rule 502, Judicial Discipline and Standards, of South Carolina Rules of Appellate Court Rules. And Jurisdiction of the Panel of Hearing Masters was proper pursuant ot Rule 502, Judicial Discipline and Standards, South Carolina Appellate Court Rules.

STATUTES AND RULES INVOLVED

THIS case involves S.C. Code Ann. Section 20-30.3; as amended; Rule 501, 5(c)(1), Code of Judicial Conduct, South Carolina Appellate Court Rules, Rules 502 and 503, Judicial Discipline and Standards, South Carolina Appellate Court Rules; and 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

THE PETITIONER, Harry C. Brown, Sr., is a citizen of the County of Jasper, and the State of South Carolina. He was the elected Probate Judge for Jasper County since November, 1986. As such, he was and is now a judicial officer.

Petitioner adversary is The Board of Commissioners on Judicial Standards (Commission). The Commission powers are prescribed in Rule 502, Judicial Discipline and Standards, of the South Carolina Appellate Court Rules. It is charged with the responsibility of conducting preliminary investigation of complaints of misconduct by judges. If misconduct is disclosed, the

Commission is further charged with the responsibility of filing a Complaint against the Judge who is the subject thereof. An Answer is required to be filed, a hearing is scheduled thereon before a panel styled Hearing Masters, who, after the hearing, file a Report with the Commission containing their findings and recommendations.

The legal representative for the Commission, referred to as the Examiner and or the Respondent are granted leave to file a Statement of Objections to the Report of the Hearing Masters. If a Statement of Objection is filed, an appearance is authorized before the Commission, who, thereafter will act upon the Report of the Hearing Masters through the filing of a Certification to the Supreme Court of South Carolina (Supreme Court) with its recommendations in regards to the manner of discipline to be administered.

ON OR ABOUT June 9, 1995, the Commission caused a Complaint (App 1) to be served upon the Petitioner. One of the alleged allegation of misconduct therein was that the Petitioner, contrary to a Jasper County, South Carolina Ordinance, failed to turn over such fees and honorariums to the County Treasurer, specifically, fees and honorariums received for performing marriage ceremonies. Other acts of misconduct were alleged in the Complaint. The Supreme Court in its Final Order (App 27) of September 11, 1996, found that the Respondent "committed Judicial misconduct by retaining fees and honorariums given him for performing marriage ceremonies. Specifically, it was held that his conduct violated Canon 5 (C) (1), of Rule 501 of the Code of Judicial Conduct, and imposed a private reprimand.

FURTHER, THE SUPREME COURT in its Final Order enjoined the Petitioner to "henceforth submit any payments received for the performance of marriage ceremonies as provided in the County Ordinance",and admonished Petitioner that his failure to do so would result in a more severe sanction than what was imposed on September 11, 1996.

IN 1953, THE GENERAL ASSEMBLY of South Carolina enacted Code Section 20-30.3, a special provision for Jasper County, which provided as follows:

> "The Judge of Probate of Jasper County, when requested, shall perform marriage ceremonies during official office hours. He shall charge and collect three Dollars for each marriage license issued by him, regardless of whether it is issued during office hours or not. He shall make no charge for issuing certified copies of marriage certificates. He shall make no charge for the performance of marriage ceremonies during office hours. He or someone acting in his behalf shall collect all fees and they shall, together with all other fees and commissions received by the probate judge, be turned over monthly to the treasurer of the County".

Section 20-30.3 became the subject of a series of amendments. The last two amendments occurring during the 1971 and 1974 session of the General Assembly of South Carolina. Section 20-30.3, as Amended in 1971, read as follows:

> The Judge of Probate for Jasper County, when requested, shall perform marriage ceremonies during official office hours. He shall charge and collect ten dollars for each marriage license issued by him, regardless of whether it is issued during office hours or not. He shall charge one dollar for issuing certified copies of marriage certificates. He shall make no charge for the performance of marriage ceremonies during office hours. He or someone

acting in his behalf shall collect such fees as they shall, together with all other fees and commission received by the probate judge, be turned over monthly to the treasurer of the county".

THE 1974 AMENDMENT of Section 20-30.3 read as follows:

> The Judge of Probate of Jasper County, when requested, may perform marriage ceremonies during official office hours. He shall charge and collect ten dollars for each marriage license issued by him, regardless of whether it is issued during office hours or not. He shall charge one dollar for issuing certified copies of marriage certificates. He or someone acting in his behalf shall collect all fees and they shall, together with all other fees and commissions received by the probate judge, be turned over monthly to the treasurer of the county".

Performing marriage ceremonies during office hours became a matter of discretion with Probate Judges and their making a charge for performing them during office hours was removed. There have been no modification or amendment to Section 20-30.3, since the 1974 amendment. Section 20-30.3 was never repealed. The restraint against making a charge for performing marriage ceremonies having been removed, the

implication is clear from the 1974 amendment that the Probate Judges for Jasper County were authorized to make and retain remunerations of any kind, including a charge for performing marriage ceremonies during office hours or thereafter.

PETITIONERS PREDECESSOR in office prior to November 1986, performed marriage ceremonies during and after office hours, and retained the remunerations received from the participants in the ceremonies.

ON DECEMBER 5, 1994, Jasper County Council, adopted the following ordinance:

> AN ORDINANCE TO ESTABLISH FOR JASPER COUNTY PROVISIONS FOR DISPOSITION OF FEES COLLECTED:
>
> SECTION I:
>
> ALL SUCH FUNDS GENERATED from fees collected and monies received by Jasper County Departments' employees and or elected officials shall be memorialized with appropriate accounting methods for the purposes of audits and all such funds shall be timely deposited with the Jasper County Treasurer's Office. "

THE "ADVISORY COMMITTEE ON STANDARDS

OF JUDICIAL CONDUCT", created pursuant to Rule 503, South Carolina Appellate Court Rules, issued its opinion #26-194 on October 10, 1994, which provided in part, as follows:

> III. A probate judge may not accept or obtain an honorarium for performing marriage ceremonies. Canon (5) (C) (1) of the Code of Judicial Conduct states that "a judge should refrain from financial and business dealings that tends to exploit his judicial position". A judge who accepts an honorarium for marital services performed is exploiting his judicial position for his own personal gain and thus violating Canon (5) (C) (1). Furthermore, the honorarium cannot be accepted as a gift under (4)(a)-(c) because it arises directly from his duties and powers conferred upon the judge. Therefore, a probate judge cannot accept an honorarium for performing marital services".

PETITIONER CHALLENGE the Constitutionality of Jasper County Ordinance and the Advisory Committee Opinion at all stages of the Disciplinary Proceedings. In his Answer, he allege that the application and enforcement of the provisions contained in the Jasper County Ordinance and the Advisory Committee opinion would deprive him of due process and equal protection of law as guaranteed by the Fourteenth Amendment

to the Constitution of the United States of America and of the State of South Carolina.

FOLLOWING THE HEARING before the Hearing Masters, Petitioner moved the Commission with a Notice of Motion and Motion (Appendix 16 thru 16F), among the other relief stated therein, to suspend the proceedings and for leave to be granted to him to seek Judicial relief form the enforcement of the Jasper County Ordinance and the Advisory Committee Opinion upon the ground that the compensation to be realized for the services rendered in performing marriage ceremonies was a vested property right and to restrict, limit or curtail hisright to be compensated for a service which he was statutorily authorized to be performed, would deprived him of a vested property right, and of property without due process and equal protection of the law as guaranteed by the applicable causes of the Constitution of the State of South Carolina and of the United States of America.

FOLLOWING THE FILING of the Certification of the

Record (App 19), Petitioner in a Motion to Dismiss of July 20, 1960 (App 16) moved the Supreme Court for the identical relief sought in his Notice of Motion and Motion to the Commission and upon the grounds that enforcement of the Jasper County Ordinance and the Advisory Commission Opinion restricted, limited, and or curtailed his right to accept and retain remuneration for a service authorized to be performed, and deprived him of a vested property right and property without due process and equal protection of the law as guaranteed by the Constitution of the State of South Carolina and of the United States of America.

AS STATED earlier, the Final Order of the Supreme Court of September 5, 1996, was entered, adopting therein the findings of the Hearing Masters that he committed judicial misconduct by retaining fees and honorariums given to him for performing marriage ceremonies, but without allowing a determination to be made that the collection and retention of fees and honorariums were not permitted by law, and yet went

on to hold that the alleged conduct was unethical. A sanction of a private reprimand was therein imposed upon him. Further, the Supreme Court to required the Respondent to remit any payments received for the performance of marriage ceremonies as required in the Jasper County Ordinance. He was admonished that his failure to do so would result in a more severe sanction than was imposed in the Final Order.

ON OCTOBER 10, 1996, PETITIONER filed with the Supreme Court his Notice of Intention to Appeal to the United States Supreme Court by way of a Writ of Certiorari from final judgement, ruling and decision of the Supreme Court, made and entered in this cause on September 11, 1996. Simultaneously, with the filing of his Notice of Intention to Appeal,, a Request for Stay was made directly to the Supreme Court of for its consideration. In an Order (App 35) of October 24, 1996, the Request for Stay was denied. In the October 24, 1996 Order, a requirement was placed upon the Petitioner to file an affidavit with the Clerk of the Supreme Court indicating

whether or not he was in compliance with the September 11, 1996 Final Order. Upon being served with the October 24, 1996 Order, Petitioner filed and served a Notice of Motion and Motion for the modification thereof, asking that following provisions thereof be vacated and set aside:

> FURTHER, RESPONDENT SHALL within ten (10) days of this Order, file an Affidavit indicating whether or not he has complied since September 11, 1996, with our Order requiring him to remit payments to the County. If the Affidavit indicate a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction".

THE MOTION FOR MODIFICATION of Order was denied on November 7, 1966.

THE CLERK OF THE SUPREME COURT, without a supporting Affidavit or verified petition, caused an Order containing a Rule to Show Cause (App 41) to be entered and serve on November 7, 1996, requiring the Petitioner to appear before the Supreme Court to Show Cause "why he should not be held in contempt.

PETITIONER as required, and appeared before the Commission on November 15, 1996, at which time the Order of the Commission (App 45) was published, adjudging that he stood privately reprimanded and admonished to comply with the terms of the Supreme Court Order of September 11, 1996.

PETITIONER after being served with the November 7, 1996 Order containing the Rule to Show Cause, served and filed a Motion to Dismiss the same. The Motion was orally denied on December 4, 1996, during the hearing on the Rule to Show Cause. The decision of the Supreme Court on the Rule to Show Cause was pending as of December 9, 1996.

REASONS FOR GRANTING THE WRIT

(Questions Number One and Two)

SECTION 28 USC 1257(a) provides that final judgement of the highest Court of a State inwhich a decision could be had, maybe reviewed by this Court by writ of certiorari where the validity of a statute of any State is drawn in question on the

grounds that it is repugnant to the Constitution of the United States, or where any title, right, privilege, or immunity is specifically set up or claim under the Constitution of the United States."DRAWN INTO QUESTION is the validity of Section 20-30.3 of the South Carolina Code of Laws for 1976, as amended, which authorized the Petitioner, as the Jasper County Judge of Probate to perform marriage ceremonies without any restrictions in regards to making a charge for performing them during office hours or at other times. The statute in question requires him to collect those fees enumerated therein and turn them over to the Treasurer for Jasper County. The statute, does not prohibit the making of a charge, and from its legislative history, by implication authorized the making of a charge. It is wholly absent in regards to the disposition he should or may make of any remuneration, whether being compensation, consideration, a gift, or an honorarium that he may receive for performing marriage ceremonies at any time, during office hours or thereafter.

PETITIONER asserted that pursuant to Section 20-30.3,

being authorized to receive income, he acquired the right to receive property, and on the receipt thereof, the remuneration would become his property. It has been repeatedly held by this Court that the "Rights of property which has been created by the common law cannot be taken away without due process; but the Law itself, as a rule of Conduct may be change at will, or even at the whim, of the legislature, unless prevented by constitutional limitations," Munn v. Illinois, 94 U.S.

113 (1897).

THIS COURT speaking further an Allgeyer v. Louisiana, 165 U.S. 578 (1897), held that:

> "The liberty mentioned in that amendment deems not only the right of the citizens to be free from the mere physical restraint of his person, as by incarceration, but the term is deem to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn a livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter in all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above

mentioned.

THE JUDGEMENT OF THE Supreme Court of was final within the meaning of the language contained in 28 U.S.C. 1257(a). It is clear that a conflict developed from the Supreme Court's Judgement with the Constitution of the United States. The conflict being whether or not the application of the proscription contained in the Jasper County Ordinance against the rights accorded to an claimed by the Petitioner through Section 20-30.3 of the South Carolina Code of Laws, for 1976, as amended, is repugnant to the Constitution of the United States and infringes upon, his rights, title and privilege to "due process and equal protection of the law" Thatare specially set up and are claimed by the Petitioner under the Constitution of the United States.

THE HOLDING of this Court in Fifke -vs- State of Kansas, 27 U.S. 380, 71 L.Ed 1108, 47 S.CT. 655, would be depositive of the issue that a substantial Federal question exist and warrants the granting of the Writ of Certiorari to the

Supreme Court of South Carolina. In that case, this Court held that:

> "A decision of a State Court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the Statute as so applied, and the judgement is, therefore, reviewable by writ of certiorari under Section 237 of the Judicial Code (Comp. St, Section 1214. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."
>
> "And this Court will review the findings of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidentiary support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon their Federal question, to analyze the facts.

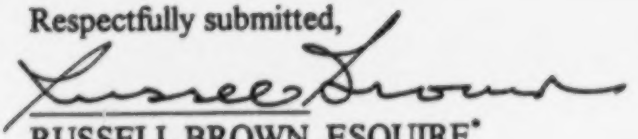
THE enforcement of the Jasper County Ordinance, by the Supreme Court of South Carolina, against for the right of the Respondent to receive and retain remuneration for performing marriage ceremonies as authorized by Section 20-30.3, would deprive him of a property right protected under the due process and

equal protection clause of Constitution of the United States of America. Such being the case, a Federal question is presented for review by this Honorable Court.

CONCLUSION

FOR ALL THE FOREGOING reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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December 10, 1996.

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE MATTER OF)	BEFORE THE BOARD OF
)	COMMISSIONERS ON
HARRY C. BROWN, SR.)	JUDICIAL STANDARDS
PROBATE JUDGE FOR)	
JASPER COUNTY,)	
)	COMPLAINT
Respondent.)	
)	
)	

I.

The Respondent, Harry C. Brown, Sr., is a judge within the meaning of 2 (b) of the Rule on Judicial Discipline and Standards, Rule 502, S.C.A.R.C., and is a Judicial Officer of the State of South Carolina, viz., a Probate Judge in and for the County of Jasper, South Carolina.

II.

Upon information and belief, Respondent has committed

the following acts which constitute misconduct as defined in 1 of the Rule on Judicial Discipline and Standards:

A. The General Assembly in 1953 enacted a local law for Jasper County, S.C. Code Ann. 20-30.3 (1962), attached as Exhibit 1, which directed the Judge of Probate of Jasper County, when requested, to perform marriage ceremonies during official office hours. This local law, which was amended in 10971, (Act No. 237, 1971 S.C. Acts 269, attached as Exhibit 2) and again in 1974 (Act 1148, 1974 S.C. Acts 2632, attached as Exhibit 3 [but which amendment was contra to the provisions of S.C. Const. art. V, 1 and art. VIII, 7 ratified and effective in 1973]), further directed the Probate Judge to collect $10.00 for each marriage license issued by him as well as $1.00 for issuing certified copies of marriage certificates. The 1971 law, as amended, directed that the Probate Judge "shalll make no charge for the performance of marriage ceremonies during office hours." All versions of the local law directed the Probate Judge to turn over monthly to

Treasurer for marriage license fees remitted to the County from February, 1994, through September, 1994, are attached hereto as Exhibit 4.

E. Persons applying for marriage licenses are also told by the Respondent or his office staff that the Respondent can perform marriage ceremonies. The Respondent or his office staff schedule appointments (usually 24 hours after the issuance of the marriage license) with interested couples for the Respondent to perform the marriage ceremony, and further advise the individuals of the amount of the cash payment or marriage fee which the Respondent charges for performing the ceremony. During th Respondent's tenure as Judge of Probate, this ceremony fee or cash payment has increased from $20.00 to $50.00 per ceremony. The Respondent refers to these ceremony fees/cash payments as "honorariums." Many of these marriage ceremonies have been performed by the Respondent on county property on the grounds of the Jasper County Courthouse and/or during Respondent's regular business hours.

F. Despite the various provisions of the law cited in Paragrah A, in effect throughout the Respondent's tenure as Probate Judge, which precluded the Respondent from charging for marriage ceremonies performed during office hours and which required the Respondent to turn over to the Treasurer of the County all fees and commissions received by the Probate Judge, the Respondent has (1) collected fees/honorariums for performing marriage ceremonies during office hours on County property; and (2) has failed to turn over such fees/honorariums to the County Treasurer.

G. The decision of the South Carolina Supreme Court In the Matter of John Land Johnson, 302 S.C. 532, 397 S.E. 2d 522 (1990), placed the Respondent on notice that any fee collected by theRespondent in his capacity as Probate Judge, including those collected for performing marriage ceremonies, whether styled as "honorariums" or otherwise, were governed by S.C. Code Ann. 8-21-760 (1986), as amended, et. seq., and should be accounted for and paid into

the general fund of the county pursuant to Title 8, Chapter 21, Article 7 of the S.C. Code, whether or not specifically enumerated in Article 7. A copy of the Johnson decision is attached as Exhibit 5.

H. In August, 1994, a newspaper article was published in the Savannah Morning News, a copy of which is attached hereto as Exhibit 6, which raised questions about the propriety of the Respondent retaining $50.00 "personal honorariums" for performin marriage ceremonies during regular business hours and in the county courthouse.

I. In October, 1994, the Advisory Committee on Standards of Judicial Conduct issued Opinion No. 26-1994, a copy of which is attached as Exhibit 7, which stated, among other things, that a Probate Judge may collec a fee for performing marriage ceremonies if (1) the fee was authorized by the county governing body and (2) the fee collected was deposited in the general funds of the county. The Advisory Opinion further held specifically that "a Probate Judge may not

accept nor retain an honorarium for performing marriage ceremonies." A copy of this advisoy opinion was mailed by Court Administration to all Probate Judges, including the Respondent, on or about October 28, 1994.

J. On December 5, 1994, the Jasper County Council enactedc an ordinance which directed that all funds generated from fees collected and monies received by Jasper County departments'employees and/or elected officials should be accounted for and timely deposited with the Jasper County Treasurer's Office. A copy of this ordinance is attached hereto as Exhibit 8. On December 9, 1994, the County Administrator issued a memorandum to all county department heads and elected officials directing that they deposit into the County General Fund "all fees, honorariums, fees collected incident to [their] position and collected on county time or property", and holding each official "accountable" for such fees or collections as of the date of the ordinance. A copy of this memorandum is attached hereto as Exhibit 9.

K. Although the Respondent has been specifically advised about each of the matters related in Paragraph's G - J, with specific reference to a letter from the Board of Commissioners on Judicial Standards dated February 22, 1995, addressed to the Respondent, attached hereto as Exhibit 10, the Respondent has refused to acknowledge the impropriety of collecting and retaining fees/honorariums for performing marriage ceremonies. Further, Respondent

(1) continues to collect fees/honorariums for performing marriage ceremonies which are not authorized by the Jasper County council;

(2) continues to collect fees/honorariums for which the Respondent does not account for nor pay into the general fund of Jasper County; and

(3) continues to accept and retaing for his own personal use fees/honorariums for performing marriage ceremonies.

III.

As a result of the foregoing, Respondent has committed acts of misconduct under the Rule on Judicial Discipline and Standards, including but not limited to: a violation of Canon 1, by failing to maintain and observe high standards of conduct to preserve the independence and integrity of the Judiciary; a violation of Canon 2(A), by failing ot condict himself in a manner that promotes public confidence in the integrity and impartiality of the Judiciary; a violation of Canon 2 (B), by allowing his family, social or other relationships to influence his judicial conduct and judgement; a violation of Canon 3 (A) (3), by failing to be patient, dignified, and courteous to individuals with whom he deals in his official capacity; a violation of Canon 5 (C) (1), by engaging in financial and business dealings that

tend to interfere with the proper performance of his judicial duties and exploit the Respondent's judicial position; violation of Canon 6 (C), by failing to file public reports with the Office of the Clerk of the Supreme Court reporting the date, place and nature of any extra judicial activity for which the Respondent received compensation, including the name of the payor and the amount of compensation so received.

WHEREFORE, it is praye that the Board of Commissioners on Judicial Standards and the South Carolina Supreme Court inquire into these matters and take such action as they may deem appropriate.

C. Victor Pyle, Jr., Chairman
Board of Commissioners
On Judicial Standards

June 9, 1995.

STATE OF SOUTH CAROLINA	BEFORE THE BOARD OF COMMISSIONARS ON JUDICIAL STANDARDS
In the Matter of:	)
HARRY C. BROWN, SR., Probate Judge For Jasper County,	) AMENDED ANSWER
Respondent.	)

RESPONDENT, answering the Complaint herein, alleges:

ONE: UNLESS admitted, qualified and or explained, all allegations setforth in the Complaint are denied.

TWO: SO much of Paragraph I, which alleges, "The Respondent, Harry C. Brown, is a Judge", and is a judicial officer of the State of South Carolina, viz, a Probate Judge in and for the County of Jasper, South Carolina", are admitted. The other allegations setforth therein are denied.

THREE: PARAGRAPH II, denied.

FOUR: ANSWERING paragraph II-A of the Complaint,

Respondent alleges that the allegations setforth therein contain an incorrect re-statement of the statutory enactments specified therein, therefore, the allegations thereof are denied.

FIVE: FURTHER, answering Paragraph II A of the Complaint, Respondent alleges that during his tenure as the Probate Judge in and for the County of Jasper, State of South Carolina, the performance of his duties with respect to performing marriage ceremonies were prescribed pursuant to the provisions of Act No. 1148, 1974 S.C. Acts 2632, which, among oth things, gave him the right to elect, upon being requested, whether he should perform a marriage ceremony during official hours, and without any restrictions, limitations, or other requirements being imposed upon him in regards to making a charge for the performing of marriage ceremonies. Accordingly, Respondent alleges that in th absence of a proscription to make a charge for performing a marriage ceremony during office hours, her was never required to report an turn over any money received, whether through a charge

made, or otherwise, to the Treasurer for Jasper County. The basis for Probate Judges to report fees and commissions received, is pursuant to Article 7, Chapter 21, Title 8, not pursuant to Act No. 1148, 1974 S.C. Acts 2632, which, among other things, gave him the right to elect, upon being requested, whether he should perform a marriage ceremony during official office hours, and without any restrictions, limitations, or other requirements being imposed upon him in regardsto making a charge for the performing of marriage ceremonies. Accordingly, Respondent alleges that in the absence of a proscription to make a charge for performing a marriage ceremony during office hours, he was never required to report and turn over any money received, whether through a charge made, or otherwise, to the Treasurer for Jasper County. The basis for Probate Judges to report fees and commissions received, is pursuant to Article 7, Chapter 21, Title 8, not pursuant to Act No. 1148, 1974 S.C. Acts 2632.

SIX: PARAGRAPH II-B and II-C, denied.

SEVEN. PARAGRAPH II-D, denied.

EIGHT. PARAGRAPH II-E, Paragraph II-F and Paragraph II-G, denied.

NINE. RESPONDENT is without information sufficient to form a belief as to the allegations contained in Paragraph II-H of the Complaint. Therefore, they are denied.

TEN. ANSWERING Paragraph II-I of the Complaint, Respondent alleges that the allegations setforth therein are not applicable to him, he being the Probate Judge for Jasper County, whose duties with respect to performing marriage ceremonies are prescribed by a Legislative Enactment, to wit: Act No. 1148, 1974, S.C. Acts 2632, which authorized the Respondent, at his option, to perform marriage ceremonies during official office hours, and does not impose any proscription upon him not to make a charge for his services, and to report the amount received to the Treasurer for Jasper County. The enforcement of the provisions contained in the October 10, 1994 Advisory Opinion No. 26-1994, of the

Advisory Committee on Standards of Judicial Conduct, against the Respondent would deprive him of due process and equal protection of law as guarnteed by the Fourteenth Amendment to the Constitution of the United States of America, and of the State of South Carolina. The October 10, 1994, Advisory Opinion No. 26-1994 does not provide for retroactive application.

ELEVEN: ANSWERING Paragraph II-J of the Complaint, Respondent alleges that, pursuant to S.C. Code Ann. Section 4-9-30 (7) (1976), the Jasper County Council was without authority to enact an Ordinance abridging, curtailing or burdening the duties authorized to be performed by him, and did not impose any requirements upon him to report and turn over any money received either as a fee, or otherwise, received as a non-statutorily and directed collectible fund, fee, cost or charge for services performed that were required or assigned, to the Treasurer for Jasper County. The enforcement of the Jasper County Council Ordinance of December 5, 1994, by the

Board of Commissioners on Judicial Standards of any other agency of and within the State of South Carolina, would deprive the Respondent of equal protection and due process of law as guaranteed by the Constitution of the United States of America, and of the State of South Carolina. Further, Respondent alleges that he is a Commissioned Notary Public, as such, he is authorized to administer oaths. Therefore, he is authorized to perform marriages pursuant to the provisions of S.C. Code Ann. Section 20-1-20 (1976). The Ordinance does not provide for retroactive application.

TWELVE: PARAGRAPH II-K, denied.

THIRTEEN: PARAGRAPHS II-L, II-M, II-N, and II-O are denied in their entirety.

FOURTEEN: PARAGRAPH III, denied in its entirety.

WHEREFORE, Respondent, having fully answered the Complaint herein, prays that the same be dismissed with prejudice.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658
ATTORNEY FOR THE RESPONDENT

Charleston, South Carolina

_____,1995.

STATE OF SOUTH CAROLINA BEFORE THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS

IN THE MATTER OF:	)	
	)	
HARRY C. BROWN, SR.,	)	**NOTICE OF MOTION**
PROBATE JUDGE FOR	)	**AND**
JASPER COUNTY,	)	**MOTION**
	)	
Respondent.)		

TO: CHARLES MOLONY CONDON, ATTORNEY GENERAL, AND NATHAN KAMINSKI, JR., SENIOR ASSISTANT ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA:

PLEASE TAKE NOTICE that the Respondent, with his undersigned attorney will appear before the Board of

Commissioners on Judicial Standards, at 11:30 o'clock, a.m. on April 19, 1996, in the Conference Room of the South Carolina Court Administration, on the Second floor of the Calhoun Building, 1015 Sumter Street, Columbia, South Carolina and will move the Board of Commissioners on Judicial Standards for an Order remanding the foregoing matter to the Hearing Masters for a ruling on the Respondent's Motion to Dismiss (copy attached), or alternatively, to direct that the further processing of the within disciplinary proceedings be suspended, and for leave to be granted to the Respondent to commence an action in an appropriate judicial forum for a determination of the issue of whether the two (2) agencies identified in the Complaint herein, namely the "Advisory Committee on Standards of Judicial Conduct" and the "Jasper County Council" in "Opinion No. 26-1994" and "An Ordinance to Establish For Jasper County Provisions For Disposition of Fees Collected, Section 1, Adopted December 5, 1994", respectively, were without authority, pursuant to South

Carolina Code Ann., Section 4-9-30 (7) and Section 20-3-.3, to regulate policies and procedures for the performance of the duties and functions of the Respondent as the Probate Judge for Jasper County, South Carolina, who was elected to said office by the people (qualified voters) thereof.

GROUNDS FOR THE aforementioned Motion will be that Respondent was and continue to be statutorily authorized to administer marriage ceremonies incident to his office without any restrictions or limitations, as to time, place and the receipt of compensation of any description for said services. That the compensation to be realized for the services performed is a vested property right, and to restrict, limit or curtail Respondent's right to be compensated for a service, authorized to be performed and compensated for by others (S.C. Code Ann., Section 20-1-20), would deprive him of property right, and of property without the due process and equal protection of law, as guaranteed by the applicable clauses of the Constitution of the State of South Carolina and of the

United States of America. AND

THAT IN VIEW of the Constitutional prohibition, as aforesaid, The Board of Commissioners of Judicial Standards would without authority entertain a Complaint, subject the Respondent to the threat of discipline, and discipline the Respondent for the engaging in performance of activities that are statutorily authorized to be performed by the Probate Judge for Jasper County.

RUSSELL BROWN, ESQ.
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658
ATTORNEY FOR
RESPONDENT

Charleston, South Carolina

_____,1996.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN RE:	)	
	)	CERTIFICATION OF
THE	)	
HARRY C. BROWN, SR.	)	RECORD
Probate Judge for	)	
Jasper County,	)	
	)	
Respondent.	)	
	)	
	)	

The records of the Board of Commissioners on Judicial Standards pursuant to South Carolina Appellate Court Rule 52, Paragraph 20, are certified as follows:

1. Complaint
   Notice dated June 9, 1995, and
   Complaint dated June 9, 1995.

2. Answer of Defendant
   Answer dated July 5, 1995.

3. Amended Answer and Notice of Motion and Motion
   Dated September 16, 1995.

4. Examiner's Hearing Memorandum
   Dated September 22, 1995.

5. Transcript of Record

6. Transcript of hearing held before Masters on September 22, 1995.

7. Transcript of Record
   Transcript of conclusion of hearing heldbefore Hearing Masters on November 17, 1995.

8. Exhibits
   Examiner's Exhibits 1 through 13 (Notebook) Respondent's Exhibits 1 and 2.

9. Report of Hearing Masters
   Report dated March 1, 1996.

10. Respondent's Statement of Objection to the Report of the Hearing Masters.
    Dated April 5, 1996.

11. Return to the Respondent's Statement of Objections to the Report of the Hearing Masters.
    Dated April 15, 1996.

12. Notice of Motion and Motion, Motion and Motion and Motion Notice dated September 16, 1995 andMotion dated April 16, 1996
    (Notice same as submitted to Masters resubmitted to Board)

13. Report of the Board of Commissioners on Judicial Standards
    Report dated April 30, 1996.

Administrative Assistant
Judicial Standards

Commission

Date: May 2, 1996

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

JUDICIAL DISCIPLINE AND STANDARDS

IN THE MATTER OF:)
)
HARRY C. BROWN, SR.,)
PROBATE JUDGE FOR)
JASPER COUNTY,)
)
RESPONDENT.)
)

MOTION TO DISMISS, OR ALTERNATIVELY TO SUSPEND FURTHER ACTION IN THE WITHIN

DISCIPLINARY PROCEEDING AND GRANT LEAVE TO THE RESPONDENT TO OBTAIN A JUDICIAL DETERMINATION FROM AN APPROPRIATE JUDICIAL FORUM DECLARING THE AUTHORITY OF THE ADVISORY OF THE ADVISORY COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT AND THE JASPER COUNTY COUNCIL TO PRESCRIBE POLICES AND PROCEDURES FOR IN THE OPERATION OF HIS OFFICE AS THE ELECTED JUDGE OF PROBATE FOR JASPER COUNTY, AND FOR THE RELAXATION OF PARAGRAPH 33 (A) OF THE RULES OF JUDICIAL DISCIPLINE AND STANDARDS:

TO: **THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE SUPREME COURT OF SOUTH CAROLINA:**

COMES NOW THE RESPONDENT and moves this Honorable Court for an Order of Dismissal of the foregoing Proceeding, or alternatively for an Order directing the suspension of further action toward the final determination thereof and the relaxation of Paragraph 33 (a) of the Rules of Judicial Discipline and Standards, with leave being granted to the Respondent to

commence an action in an appropriate judicial forum for a determination of the issue of whether the two (2) agencies identified in the Complaint herein, namely the "Advisory Committee on Standards of Judicial Conduct" and the "Jasper County Council," in "Opinion No. 26-1994" and "An Ordinance To Establish For Jasper County Provisions for Disposition of Fees Collected, Section 1, adopted December 5, 1994," respectively were without authority, pursuant to S.C. Code Ann., Sections 4-9-10, 4-9-120 and 8-21-760, to regulate policies and procedures for the performance of marriage, ceremonies, a statutorily authorized function of the office of the Judge of Probate for Jasper County, South Carolina, an elected judicial official by the people of thereof.

GROUNDS FOR THE AFOREMENTIONE MOTION ARE:

ONE: THAT THE RESPONDENT, at all times mentioned in the Complaint was and continued to be statutorily authorized to performed marriage ceremonies incident to his office and or as an individual otherwise officially authorized to administer

oath in Jasper County and elsewhere within the State of South Carolina. Respondent was possessed of dual authorization, and without any restrictions or limitation, as to time, place and the receipt of remuneration in any form or typw being a fee (fixed or discretionary in amoung), gratuity, gift, honorarium, donations, or otherwise;

TWO: **THAT THE REMUNERATIONS** allegeg to have been realized by the Respondent for performing marriage ceremonies were part vested property rights to receive incomes for services rendered;

THREE: **THAT TO RESTRICT**, limit or curtail Respondent's right to accept and retain remunerations for a service, the performance of which is authorized to be performed by the Respondent, and by others, but without their right to accept and retain remunerations therefor being restricted, limited or curtailed, deprive him of a property right without due process and equal protection of the law, as guaranteed by the constitution of the State

of South Carolina and of the United States of America;

And,

FOUR: **BECAUSE OF THE** Constitutional proscriptions, the Board of Commissioners on Judicial Standards was without authority to initiate and maintain the foregoing Complaint and subject the Respondent to the threat of being Discipline for for engaging in the performance of activities that were statutorily authrized.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658
ATTORNEY FOR RESPONDENT

Charleston, South Carolina

July 20 ,1996.

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown, Respondent

ORDER

Respondent was found to have committed judicial misconduct by retaining fees or honorariums given him for performing marriage ceremonies. The Hearing Masters found this conduct violated Canon 5 (C) (1) of Rule 501, SCACR, the Code of Judicial Conduct and recommended a private reprimand. The Judicial Standards Commission concurred in the Masters' finding, but recommended respondent receive a public reprimand. We find misconduct, and impose a private reprimand.

Respondent appears to believe that his conduct is statutorily authorized, and therefore cannot be deemed unethical. Assuming but not deciding that the collection and retention of these fees is permitted by law, we none-the-less hold that such conduct is unethical. We point out, for example, that we have forbiddent probate judges from action as personal representatives except for family members, despite a statute specifically authorizing them to act as the personal representative in certain small estates. Compare D.C. Code Ann. 62-3-1202A (Supp. 1995) with Canon 5 (D), SCACR. We remind respondent that a judge must not only avoid impropriety, but must scrupulously avoid even the **appearance** of

impropriety. Respondent shalll henceforth remit any payment received for the performance of marriage ceremonies as provided in the County Ordinance. Failure to do so shall result in a more severe sanction than that we impose today.

IT IS HEREBY ORDERED that this matter be remanded to the Judicial Standards Commission for the purposes of administering a private reprimand and of admonishing respondent of the need for him to immediately and fully comply with the terms of this Order. Respondent shall appear at the time and place designated for such purposes.

_____ C.J.

_____ A.J.

_____ A.J

_____ A.J.

Burnett, A.J., not participating

September 11, 1996

IN THE UNITED STATES SUPREME COURT

THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS,	)	
Appellee,	)	
-versus	)	
	)	**NOTICE OF APPEAL**
HARRY C. BROWN, SR., JUDGE OF PROBATE FOR JASPER COUNTY,	)	
	)	**NO:_____**
Appellant.	)	

TO: CHARLES M. CONDON, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, AND THE APPELLEE:

THE APPELLANT, Harry C. Brown, Sr. through his undersigned counsel hereby gives Notice of Intention to appeal and does hereby appeal to the United States Supreme Court by way of **Certiorari** from the judgment, rulings and decision of the South Carolina Supreme Court made and entered in the foregoing matter

on September 11, 1996.

Dated this 10th day of October, 1996.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT

STATE OF SOUTH CAROLINA

THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS, Appellee, -versus- **HARRY C. BROWN, SR., JUDGE OF PROBATE FOR JASPER COUNTY,** Appellant.	**REQUEST FOR STAY**

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICE OF THE SUPREME COURT OF SOUTH CAROLINA:

THE APPELLANT Harry C. Brown, Sr., has heretofore given Notice of Appeal by way of Certiorari to the United States Supreme Court and which Notice wa submitted for filing on October 10, 1996.

THEREFORE, in accordance with **RULE 225** of

the South Carolina Supreme Court's Rule of Appellate Practice, the Appellant moves this Honorable Court for a Stay of its **Order** of judgement dated September 11, 1996, for a period of Ninety (90) days to enable Appellant to perfect his Petition of Certiorari to the United States Supreme Court and then thereafter until such time as the United States Supreme Court has disposed of the said Petition for Certiorari, otherwise Appellant's constitutionally protected right to appeal and pursuant of this matter would be fruitless and academic.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

ATTORNEY FOR APPELLANT

Charleston, South Carolina

October 10 1996.

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown, Respondent.

ORDER

Respondent's request for a stay of our order dated September 11, 1996, is denied. Further, respondent shall, within ten days of the date of this order, file an affidavit indicating whether or not hes has complied since September 11, 1996, with our order requiring him to remit payments to the County. If the affidavit indicates a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction.

IT IS SO ORDERED.

_____ A.J.

_____ A.J

_____ A.J.

_____ A.J.

Columbia, South Carolina

October 24, 1996

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

JUDICIAL DISCIPLINE AND STANDARDS

IN RE:	)
	)
IN THE MATTER OF HARRY C. BROWN, SR.,	)
	)
PROBATE JUDGE FOR JASPER COUNTY,	)
	)
RESPONDENT,	)
	)
	)

NOTICE OF MOTION AND MOTION
FOR MODIFICATION OF ORDER

TO: THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

COMES NOW THE RESPONDENT and moves the Court for an Order modifying the Order that was entered in the

above matter on October 24, 1996 through the vacating and setting aside of so much thereof which provides as follows:

> "FURTHER, respondent shall, within ten (10) days of this order, file an affidavit indicating whether or not he has complied since September 11, 1996, with our order requiring him to remit payments to the County. If the affidavit indicates a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction."

GROUNDS for the aforementioned motion will be that the quoted provisions of the referenced Order directs the filing of an affidavit from which the Court or the Clerk may interpret and find that it disclose sufficient reason for the issuance of a Rule To Show Cause to the Respondent, and thereafter subject him to appear and be exposed to the Court's judgement that he is in the criminal contempt thereof and be further subjected to punishment up to and including imprisonment in the discretion of the Court.

The demand for the production and filing of the aforementioned affidavit violates the Respondent's constitutional privilege against self incrimination as guaranteed by the Fifth Amendment to the United States Constitute and or Article I, Section12, of the Constitution of the State of South Carolina.

RUSSELL BROWN, ESQUIRE
41 Morris Street
Charleston, SC 29403
Phone: 803-723-1658

ATTORNEY FOR RESPONDENT

Charleston, South Carolina

November 4, 1996.

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, SC 29211
(803) 734-1080

November 7, 1996

Russell Brown, Esquire
41 Morris St.
Charleston, SC 29403

Re: BROWN, HARRY C. SR. - In the matterof

Dear Mr. Brown:

The following Order has been endorsed on your Motion for Modification of Order in the above entitled matter:

"Motion for Modification of Order is denied.

s/Ernest A. Finney, Jr. C.J.
For the Court

November 07, 1996"

Your attention is directed to the Rule to Show Cause which is scheduled for hearing on November 20, 1996, at 2:30 P.M., with reference to the above matter.

Very truly yours,

CLERK

CNB, Jr./bfs

cc: The Honorable Harry C. Brown, Sr.
The Honorable Nathan Kaminski, Jr.
Ms. Carol Fulton
The Honorable Charles Molony Condon

THE SUPREME COURT OF SOUTH CAROLINA

In the Matter of Harry C. Brown, Sr., Respondent.

ORDER

On September 11, 1996, the Court issued a private reprimand to respondent. On October 24, 1996, the Court issued an order which, among other things, required respondent to file an affidavit within ten (10) days. Failure to file an affidavit would result in the issuance of a Rule to Show Cause by the Clerk of Court. Id. The ten day period expired on November 4, 1996, without submission of the affidavit.

IT IS ORDERED that respondent shall appear before the Court in the Supreme Court Courtroom, in Columbia, South Carolina, at 2:30 P.M., or as soon thereafter as the matter can be heard, on November 20, 1996, to show cause why he should not be

held in contempt.

Copies of this order, certified by the Clerk of this Court, shall be served upon the respondent or his counsel, personally or by certified-return receipt mail.

_____

Columbia, South Carolina

November 7, 1996

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Personally appeared before me Clyde N. Davis, Jr., Clerk of the South Carolina Supreme Court, who after being duly sworn, deposes and says: That on information and belief, the order of the Court dated September 11, 1996, issuing the private reprimand and setting forth certain stipulations of the Court was sent to Harry C. Brown, Sr., and Russell Brown by certified mail-return receipt requested and was received by Harry C. Brown, Sr., and Russell Brown, as evidenced by return receipts received in the Office of the Clerk.

On information and belief, an Order of the Court dated October 24, 1996, was sent to Mr. Russell Brown and Mr. Harry C. Brown, Sr., advising that Mr. Harry C. Brown, Sr., must furnish this Court an affidavit that he had compiled fully with this Court's Order of September 11, 1996, remitting payments to the county, by certified mail-returned receipt requested and was received by Mr. Russell Brown and Mr. Harry C. Brown, Sr., as evidenced by return receipts received in the Office of the Clerk.

Mr. Harry C. Brown, Sr., has not complied with the Court's orders of September 11, 1996, and October 24, 1996.

_____

CLERK

Sworn to and subscribed before

me this 12th day of November, 1996.

NOTARY PUBLIC OF SOUTH CAROLINA

My Commission Expires: April 8, 2004

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS

IN THE MATTER OF:	)	
	)	**ORDER OF**
HARRY C. BROWN, SR.	)	**BOARD OF**
JASPER COUNTY	)	**COMMISSIONERS**
JUDGE OF PROBATE	)	
	)	
RESPONDENT.	)	
	)	
	)	

THIS MATTER CAME BEFORE THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS PURSUANT TO SOUTH CAROLINA APPELLATE COURT RULE 502, RULE ON JUDICIAL DISCIPLINE AND STANDARDS.

THE RESPONDENT WAS SERVED WITH A FORMAL COMPLAINT DATED JUNE 9, 1995, ALLEGING CERTAIN ACTS OF MISCONDUCT UNDER THE RULE ON

JUDICIAL DISCIPLINE AND STANDARDS AND THE CODE OF JUDICIAL CONDUCT.

THE MATTER WAS HEARD BEFORE A PANEL OF HEARING MASTERS SEPTEMBER 22, 1995, AND NOVEMBER 17, 1995, WHO FOUND RESPONDENT GUILTY OF MISCONDUCT AND RECOMMENDED A PRIVATE REPRIMAND.

AFTER HEARING ORAL ARGUMENTS, THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS AN MAY 2, 1996, RECOMMENDED TO THE SUPREME COURT OF SOUTH CAROLINA THAT A SANCTION OF PUBLIC REPRIMAND BE ISSUED.

SUBSEQUENT TO A HEARING ON JULY 24, 1996, THE SUPREME COURT, BY ORDER DATED SEPTEMBER 11, 1996, FOUND THE RESPONDENT GUILTY OF JUDICIAL MISCONDUCT AND IMPOSED A SANCTION OF PRIVATE REPRIMAND. THE COURT FURTHER ORDERED THAT RESPONDENT SHALL HENCEFORTH

REMIT ANY PAYMENT RECEIVED FOR THE PERFORMANCE OF MARRIAGE CEREMONIES AS PROVIDED IN THE COUNTY ORDINANCE. THE COURT REMANDED THE MATTER TO THE BOARD AND ORDERED THAT A PRIVATE REPRIMAND BE ADMINISTERED BY THE BOARD OF COMMISSIONERS ON JUDICIAL STANDARDS AND THAT RESPONDENT BE ADMONISHED OF THE NEED FOR HIM TO IMMEDIATELY AND FULLY COMPLY WITH THE TERMS OF THE SUPREME COURT ORDER.

ACCORDINGLY, THE RESPONDENT, HARRY C. BROWN, HEREBY STANDS PRIVATELY REPRIMANDED AND ADMONISHED TO COMPLY WITH THE TERMS OF THE SUPREME COURT ORDER.

THE BOARD OF COMMISSIONERS ON
JUDICIAL STANDARDS

_____,CHAIRMAN

_____, VICE CHAIRMAN

_____, MEMBER

_____, MEMBER

_____, MEMBER

_____, MEMBER

_____, MEMBER

_____, MEMBER

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

JUDICIAL DISCIPLINE AND STANDARDS

IN THE MATTER OF:	)
HARRY C. BROWN, SR.,	)
Probate Judge for	)
Jasper County,	)
	)
Respondent.	)
	)

MOTION TO DISMISS:

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA:

COMES NOW THE RESPONDENT, appearing specifically and move the Court to dismiss the Order and Rule to Show Cause of the Clerk of this Court and the Affidavit issued thereafter, and respectively shows unto this Honorable Court as follows:

STATEMENT OF THE PROCEEDINGS

The above is a disciplinary proceeding commenced and maintained to final judgement pursuant to the provisions of the Code of Judicial Conduct. The Order of this Court announcing its Final Judgement was entered on September 11, 1996. Misconduct was found to have been committed by the Respondent through his retention of "fees or honorariums given him" for performing marriage ceremonies. Sanction of a private reprimand was imposed.

Among other things, the Order provided that:

> "Respondent shall henceforth remit any payment received for the performance of marriage ceremonies as provided in the County Ordinance. Failure to do so shall result in a more severe sanction that we impose today."

The Jasper County Ordinance referred to, and titled "An Ordinance to Establish For Jasper County Provisions For Disposition Of Fees Collected," provides:

> "All such funds

generated from fees collected and monies received by Jasper County Departments' employees and/or elected officials, shall be memorialized with appropriate accounting methods for the purpose of audit and all such funds shall be timely deposited with the Jasper County Treasurer's Office."

NOTICE OF APPEAL by way of Certiorari to United States Supreme Court from the Judgements, rulings and decision of this Court, made and entered in the foregoing matter on September 11, 1996, were served and filed by mailing on October 10, 1996. Simultaneously, with the service and filing by mailing of the Notice of Appeal, Respondent served and filed by mailing his "**REQUEST FOR STAY**" and moved the Court for a Stay of the Order of Judgement dated September 11, 1996, for a period of Ninety (90) days to enable the Respondent to perfect his Petition for Certiorari to the United States Supreme Court and then thereafter until such time as the United States Supreme Court has disposed of the said Petition for Certiorari.

Respondent's Motion for a Stay of the Order of Judgement was denied in the Order of this Court on October 24, 1996. The Order further provided that:

> "Further, Respondent shall, within ten (10) days of the this Order, file and affidavit indicating whether or not he has complied since September 11, 1996, with our order requiring him to remit payments to the County. If the affidavit indicates a lack of full compliance, the Clerk of Court shall issue a Rule to Show Cause why Respondent should not receive a more severe sanction."

Upon being served with a copy of the October 24, 1996 order, Respondent served and filed by mailing his Notice of Motion and Motion for Modification of Order with his supporting memorandum, through the vacating and setting aside of the above quoted provisions thereof. Respondent asserts that the quoted provisions of the October 24, 1996 order violated his constitutional privilege against self incrimination as guaranteed by applicable provisions of the

Constitution of the United States of State of South Carolina.

The Motion for the Modification of the Order of October 24, 1994 was denied on November 7, 1996.

An Order containing a Rule to Show Cause was entered on November 7, 1996, it was directed to the Respondent, requiring him to appear before this Court, at the time and of the date specified therein, and show cause why he should not be held in contempt. It was recited therein that:

> "On October 24, 1996, the Court issued an order which, among other things, required Respondent to file an affidavit within ten (10) days. Failure to file the affidavit would result in the issuance of a Rule to Show Cause by the Clerk of Court. Id. The ten (10) day period expired on November 4, 1996, within submission of the affidavit."

Thereafter an affidavit of the Clerk of this Court was entered on November 12, 1996, reciting therein among other things, the requirement that the Respondent "furnish this Court with an affidavit that he had complied fully with this Court's

Order of September 11, 1996, remitting payments to the County," and that "Mr. Harry C. Brown, Sr., has not complied with the Court's orders of September 11, 1996, and October 24, 1996.

There was no affidavit as a basis for the issuance of the Rule to Show Cause. Respondent hereby objects to its validity. In so doing he relies upon the precedent recited in State v Nathan, 49 S.C. 199, 27 S.E. 52 (1896) and State v Blackwell, 10 S.C. 38. He moves this Court to dismiss the Rule to Show Cause upon the ground that the matters charged therein were not stated under oath. As issued, the Court did not acquire subject matter jurisdiction to hear and dispose of the same.

As a further ground for dismissal, Respondent asserts that the requirements imposed upon him on by October 24, 1996 Order of this Court is coercive and deprives him of his constitutionally guaranteed privilege against self incrimination. He therefore moves the Court to Dismiss the Order of November 7, 1996, containing the Rule to Show Cause as to

why he should not be held in contempt, and punished. The Order tends to subject the Respondent to compulsory self incrimination. Immunity from any adverse action being taken against the Respondent from his filing the affidavit has not been shown or suggested, and certainty is not available to him under existing case and or statutory law, or by an order of this or any other Court of competent jurisdiction.

ARGUMENT

IN THE ABSENCE OF IMMUNITY, CAN THIS COURT COMPEL THE RESPONDENT TO TESTIFY, BY WAY OF AN AFFIDAVIT, OVER A CLAIM OF THE PRIVILEGE AGAINST SELF INCRIMINATION?

Final judgement having been entered in the above matter, the enforcement thereof is now at issue. The enforcement device being utilized is the Court contempt powers. Punitive, not remedial results are being sought. The object of the contempt sanction is criminal in nature. The September 11, 1996 order contained a reservation to the Court

to impose a greater sanction. The sanction could be increased up to and including imprisonment. The distinction between punitive (criminal) and remedial contempt appears in State v Magazine._____S.C._____,393 S.E. 2nd 385(1990), as follows:

> "I determining the nature of a contempt sanction, the focus is whether the punishment is remedial, for the benefit of the complainant, or punitive, to vindicate the authority of the Court....If the sanction is imprisonment, it is punitive when the sentence is limited to imprisonment for a definite period rather than conditioned on compliance with the Court's order....If the sanction is a fine, it is punitive, it is punitive if paid to the Court, unless the contempt or can purge himself by compliance with Th Court's order, and remedial if paid to the Complainant....The critical inquiry is whether the contempt or can avoid a sanction or purge himself of it by complying with the terms of the original order."

Several relevant principles of law should be noted and

considered in determining the legitimacy of the Respondents claim for relief from the orders referred above. They are listed numerically:

> (1). Would the Federal Fifth Amendment exception from compulsory self incrimination extend to and protect the Respondent in Th within State judicial proceeding? Yes. "The Fourteenth Amendment secures against State invasion of the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he/she chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, "..."The Fifth Amendment privilege against the self-incrimination implemented the Fourth Amendment in such cases, and the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States." Malloy v Hogan, 378 U.S.1, 84 S. CT. 1480 (1960).
>
> (2). Does the Federal Fifth Amendment exception from

compulsory self-incrimination extend to and protect the Respondent, he being a party, instead of a witness, in the within State judicial proceeding? Yes, in Counselmen v Hitchcock, Marshall, 142 U.S. 547,_____S.CT._____, (1892) the U.S. Supreme Court held "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supporting the privilege by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all of the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provisions, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. In this respect, we give our assent rather to the doctrine of Emery's Case, in Massachusetts, then to that of People v Kelly, in New York;

and we consider that the ruling of this Court in Boyd v U.S., supra, support the view we take. Section 860, more, affords no protection against that use of compelled testimony which consist in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

(3). Would the Federal Fifth Amendment exception from compulsory self-incrimination extend to and protect the Respondent in the within State disciplinary proceeding? An affirmative response is required. We quote from 96 C.J.S. Witnesses. Sec. 441(c), the following:

"A disciplinary proceeding for the revocation of a professional or business license is not a criminal proceeding such as entitles defendant therein to refuse to testify. Hence a disbarment or other disciplinary proceeding against an attorney is not such a criminal prosecution as entitles defendant to decline to testify. However, he may invoke the constitutional privilege against

self-incrimination and decline to answer questions tending to incriminate him;"

(4). Would the Federal Fifth Amendment exception against compulsory self-incrimination extend to and protect the Respondent in the herein criminal contempt phase of the foregoing disciplinary proceeding? It does not, based on the following quotation from 96 C.J.S. Witnesses, Sec. 441 (d). "The constitutional guaranty that a person shall not be compelled to be a witness against himself in a criminal case applies in favor of a person charged with a criminal contempt, but not where the contempt charge is a civil contempt."

The following precedent taken from Kistegar v United Stats, 404 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972) should be dispositive of Respondents Motion to Dismiss:

"The power of the government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence. The power with respect to courts was established by statute in England as early as 1562, and Lord Bacon observed in 1612 that all subjects owed the King their "knowledge and

our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege.

II

THERE BEING NO AFFIDAVIT UPON WHICH THE RULE TO SHOW WAS ISSUED, DID THE COURT ACQUIRE THE SUBJECT MATTER JURISDICTION?

discovery." While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common-law principle that "the public has a right to every man's evidence" was considered an "indubitable certainty" that "cannot be denied" by 1742. The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts. Mr. Justice White noted the importance of this essential power of government in his concurring opinion in Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94, 84 S.Ct. 1594, 1611, 12 L.Ed.2d 678 (1964):

> "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. Blair v. United

States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979. Such testimony constitutes one of the Government's primary sources of information."

[1,2]

But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marked an important advance in the development of

DISCUSSION

The Order in which the Rule to Show Cause was issued, was not on oath. The absence thereof was not waived by the Respondent. The holding in State v Nathans, supra, is dispositive of this issue. There the Court held:

> "In 4 Encl. PL & Prac. 779, it is broadly and correctly stated that "the universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the Court's immediate presence, and affidavit is essential." In State v Blackwell, 10 S.C. 38, this Court held that it is a fatal objection to a rule to show cause in contempt proceedings that is made without affidavit, the Court saying: "all parties charged, otherwise than by the oath of the grand jury, with offenses other than contempt committed in the presence of the Court, are entitled to have the matters charged stated under

> oath; the penalty for false swearing being regarded as a safeguard to the liberties of the citizens."

The alleged act of disobedience did not occur within the presence of the Court, and neither did the Respondent at anytime waive the error in the issuance of the Rule to Show Cause. Subject Matter jurisdiction never vested in and with this Court.

CONCLUSION

For the foregoing reasons, Respondent prays that the Rule to Show Cause should be

Dismissed.

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